Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram

HIGH COURT (KUALA LUMPUR) — CIVIL SUITS NOS S5–23–08, S5–23–04 OF 1997 AND S5–23–13 OF 2000
AZMEL J
19 FEBRUARY 2003

Civil Procedure *— Contempt of court — Committal proceedings — Defence — Whether defence of absolute privilege available as in an action for defamation*

Civil Procedure *— Contempt of court — Sentence — Wilful and contumacious conduct by contemnor — Complete disregard shown by contemnor to an order of the High Court Contemnor a senior member of the Bar — Contemnor financially well-off — Whether warning or fine manifestly inadequate — Whether a custodial sentence appropriate*

Civil Procedure *— Contempt of court — Wilful and contumacious conduct by accused — Complete disregard shown by accused to an order of the High Court — Whether accused guilty of contempt*

Civil Procedure *— Injunction — Appeal against — Appeal filed to the Court of Appeal against injunction granted by High Court — Appeal heard but judgment reserved by Court of Appeal — Whether injunction of High Court ceased to be effective*

Civil Procedure *— Injunction — Breach of — Permanent injunction restraining defendant from publishing libellous and scandalous statements against plaintiff — Defamatory documents sent by defendant to Advocates & Solicitors Disciplinary Board despite objection by plaintiff and non-assurance of protection from action by Disciplinary Board — Whether permanent injunction breached by defendant*

Legal Profession *— Professional privilege — Communication by litigant to Disciplinary Board/Investigating Tribunal — Whether such communication equal to communication by litigant to a court of law — Whether such communication protected or covered by absolute immunity — Whether proceedings before Disciplinary Board/ Investigating Tribunal equal to proceedings before a court of law — Legal Profession Act 1976 s 111*

On 22 January 2000, the Kuala Lumpur High Court, as a result of two defamation suits instituted by the plaintiff ('the Kuala Lumpur suits'), inter alia, issued a permanent injunction against the defendant prohibiting her from publishing any libellous and scandalous statements against the plaintiff. In these two suits which were tried together, the Kuala Lumpur High Court had found the defendant liable for defamation, having ruled certain documents to be libellous and scandalous materials. These Kuala Lumpur suits were, inter alia, based on serious libellous and scandalous statements imputing criminal conduct on the part of the plaintiff made by the defendant in a written submission in an earlier civil suit at the Seremban High Court ('the Seremban suit'). The defendant appealed to the Court of Appeal against the decision of the High Court in the Kuala Lumpur

suits. The appeal was heard but judgment reserved. Apart from the defamation suits, the plaintiff had also complained of the defendant's conduct in the Seremban suit to the Advocates & Solicitors Disciplinary Board ('the Disciplinary Board'). Pursuant to the complaint, an Investigating Tribunal ('the Investigating Tribunal') was established and by letters dated 9 and 24 October 2000, the Investigating Tribunal requested from the defendant, an explanation for her conduct in the Seremban suit. The defendant by letter dated 27 October 2000 sought direction from the Investigating Tribunal as to whether she could forward to the Board documents produced at the Kuala Lumpur suits. She also requested assurances from the Board and from the plaintiff that no further action would be commenced against her. Both the plaintiff and the Board rejected her requests for the assurances. Despite such rejections, the defendant by letter dated 27 November 2000 to the Board, sent all the documents produced in the Kuala Lumpur suits and certain pleadings filed in the Seremban suit. Some of the documents sent were documents ruled libellous and scandalous in the Kuala Lumpur suits. The plaintiff, having obtained leave of court, applied for an order to commit the defendant to prison for breaching the injunction. The High Court thus had to determine whether the defendant had in law contravened the injunction dated 22 January 2000. The plaintiff contended that the defendant had breached the injunction by publishing the documents which she had sent by her letter of 27 November 2000. The defendant however asserted that her disclosure did not breach the injunction for the reasons that such disclosure constituted privileged communication and was mandatory under s 101(4)(a)(i) of the Legal Profession Act 1976.

Held, convicting the defendant for contempt of court and sentencing her to three months' imprisonment:

(1) The defendant was fully aware that the publication of the defamatory documents to any third party would constitute a breach of the injunctive order. It was for that reason that she sought directions and assurances from the Disciplinary Board not to bring any action against her for adducing additional documents which contained the prohibited documents. Despite her requests for assurances having been rejected by the Disciplinary Board coupled with the plaintiff's objection, she had nevertheless sent the documents containing the defamatory statements against the plaintiff, such statements having established her liability for defamation in the Kuala Lumpur suits. There was thus no doubt whatsoever that the defendant had breached the permanent injunction issued by the Kuala Lumpur High Court. The fact that the defendant had filed an appeal to the Court of Appeal and that the appeal was heard but the court's decision reserved did not mean that the injunctive order was no longer in force. The injunctive order would only cease to be

effective and cease to be in force if the Court of Appeal had given a decision setting aside the injunction. On the facts, there was no evidence that the Court of Appeal had given an order setting aside the High Court's injunction (see pp 564G–H, 565C–F). A

(2) Communications to the Disciplinary Board or to the Investigating Tribunal cannot be equated with communication to a court of law. Section 111 of the Legal Profession Act 1976 did not confer any immunity to the defendant when she communicated with the Disciplinary Board or the Investigating Tribunal. Section 111 only confers protection to the members of the Disciplinary Board and the Investigating Tribunal. Proceedings before the Disciplinary Board or the Investigating Tribunal cannot be equated to proceedings before a court of law where the litigants enjoy judicial immunity conferred by s 14(1) of the Courts of Judicature Act 1964 (see pp 566H–567A).* B C

(3) In an action for committal proceedings a defendant cannot invoke a defence of absolute privilege in the manner available in an action for defamation. A litigant's communication to the Disciplinary Board or Investigating Tribunal is not covered by absolute immunity under s 111 of the Legal Profession Act 1976. Even communications to a court of law that contain defamatory statements may only be done within certain limits. If the limits are exceeded then the defence of absolute privilege will no longer be available (see p 567A–C); *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 176 followed. D E

(4) On the facts, the defendant had gone beyond the reasonable limit principle as stated in *Manjeet Singh Dhillon*. Her act of sending the defamatory documents to the Disciplinary Board or Investigating Tribunal was clearly wilful and contumacious. The defendant had failed to create any doubt in the plaintiff's case and was guilty of contempt of court as alleged by the plaintiff. Having regard to all the circumstances of the case, the High Court was of the view that the acts of the defendant in sending the defamatory documents to the Disciplinary Board or Investigating Board were most unbecoming of a senior member of the Bar. She had shown complete disregard to an order of the High Court. As such, a caution or a warning was manifestly inadequate and a deterrent sentence should be imposed. A fine would serve no purpose as the defendant was financially well-off. A custodial sentence was most appropriate and would act as a deterrence. The defendant was thus sentenced to three months' imprisonment. She was also ordered to bear the costs of the proceeding (see pp 567G–H, 568B–C, G–569A). F G H I

*See Editorial Note on p 567.

[Bahasa Malaysia summary

Pada 22 Januari 2000, Mahkamah Tinggi Kuala Lumpur, akibat daripada dua guaman fitnah yang dimulakan oleh plaintif ('guaman-guaman Kuala Lumpur tersebut'), antara lain, mengeluarkan satu injunksi kekal terhadap defendan kerana menghalang beliau daripada menerbitkan apa-apa kenyataan yang berunsur libel dan melampau terhadap plaintif. Dalam kedua-dua guaman tersebut yang telah didengar bersama, Mahkamah Tinggi Kuala Lumpur mendapati defendan bertanggungjawab kerana fitnah tersebut, setelah memutuskan beberapa dokumen adalah berunsur libel dan bahan-bahan yang penuh skandal. Guaman-guaman Kuala Lumpur tersebut adalah, antara lain, berdasarkan kenyataan-kenyataan serius berunsur libel dan penuh skandal dengan mengatakan perbuatan jenayah ke atas pihak plaintif dibuat oleh defendan dalam satu hujah bertulis dalam guaman sivil terdahulu di Mahkamah Tinggi Seremban ('guaman Seremban tersebut'). Defendan telah merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi dalam guaman-guaman Kuala Lumpur tersebut. Rayuan tersebut telah didengar tetapi penghakiman ditangguhkan. Selain daripada guaman-guaman fitnah tersebut, plaintif juga mengadu tentang perbuatan defendan dalam guaman Seremban tersebut kepada Lembaga Tatatertib Peguambela & Peguamcara ('Lembaga Tatatertib'). Berikutan aduan tersebut, satu Tribunal Siasatan ('Tribunal Siasatan tersebut') telah ditubuhkan dan melalui surat-surat bertarikh 9 dan 24 Oktober 2000, Tribunal Siasatan tersebut telah memohon daripada defendan, satu penjelasan untuk perbuatan beliau dalam guaman Seremban tersebut. Defendan melalui surat bertarikh 27 Oktober 2000 memohon arahan dari Tribunal Siasatan tersebut sama ada beliau boleh mengemukakan dokumen-dokumen yang telah dikemukakan dalam guaman-guaman Kuala Lumpur tersebut. Beliau juga memohon jaminan daripada Lembaga Tatatertib dan daripada plaintif agar tiada tindakan selanjutnya akan dimulakan terhadap beliau. Kedua-dua plaintif dan Lembaga Tatatertib telah menolak permohonan-permohonan beliau untuk jaminan-jaminan tersebut. Walaupun dengan penolakan-penolakan tersebut, defendan melalui surat bertarikh 27 November 2000 kepada Lembaga Tatatertib, telah menghantar kesemua dokumen-dokumen yang telah dikemukakan dalam guaman-guaman Kuala Lumpur tersebut dan pliding–pliding tertentu telah difailkan dalam guaman Seremban tersebut. Beberapa dokumen yang dihantar adalah dokumen-dokumen yang telah diputuskan sebagai berunsur libel dan melampau dalam guaman-guaman Kuala Lumpur tersebut. Plaintif, setelah mendapat kebenaran mahkamah, telah memohon satu perintah untuk memasukkan defendan ke dalam penjara kerana melanggar injunksi tersebut. Mahkamah Tinggi dengan itu perlu menentukan sama ada defendan dari segi undang-undang telah menentang injunksi bertarikh 22 Januari 2000. Plaintif menegaskan bahawa defendan telah melanggar injunksi tersebut dengan

menerbitkan dokumen-dokumen yang beliau telah hantar melalui sepucuk surat bertarikh 27 November 2000. Defendan bagaimanapun menegaskan bahawa pendedahan beliau tidak melanggar injunksi tersebut atas sebab pendedahan sedekimian membentuk satu komunikasi terlindung dan adalah mandatori di bawah s 101(4)(a)(i) Akta Profesyen Undang-Undang 1976.

Diputuskan, menyabitkan defendan kerana menghina mahkamah dan menjatuhkan hukuman tiga bulan penjara ke atas beliau:

(1) Defendan amat sedar bahawa penerbitan dokumen-dokumen berunsur fitnah kepada mana-mana pihak ketiga akan membentuk satu perlanggaran perintah injunksi. Adalah untuk sebab sedemikian beliau telah memohon arahan-arahan dan jaminan-jaminan daripada Lembaga Tatatertib tersebut agar tidak memulakan apa-apa tindakan terhadap beliau kerana mengemukakan dokumen-dokumen tambahan yang mengandungi dokumen-dokumen yang dilarang. Walaupun permohonan-permohonan beliau untuk jaminan-jaminan tersebut ditolak oleh Lembaga Tatatertib sekali dengan bantahan plaintif, namun begitu beliau telah menghantar dokumen-dokumen yang mengandungi kenyataan-kenyataan berunsur fitnah mengenai plaintif, kenyataan-kenyataan sedemikian telah membuktikan liabiliti kerana fitnah dalam guaman-guaman Kuala Lumpur tersebut. Oleh itu sama sekali tidak diragui bahawa defendan telah melanggar injunksi kekal yang dikeluarkan oleh Mahkamah Tinggi Kuala Lumpur. Hakikat bahawa defendan telah memfailkan satu rayuan ke Mahkamah Rayuan dan bahawa rayuan tersebut telah didengar tetapi keputusan mahkamah telah ditangguhkan tidak bermaksud bahawa perintah injunksi tersebut tidak lagi. Perintah injunksi hanya akan berhenti mempunyai kesan dan berhenti berkuatkuasa jika Mahkamah Rayuan telah memberikan satu keputusan mengenepikan injunksi tersebut. Berdasarkan fakta-fakta tersebut, tiada keterangan bahawa Mahkamah Rayuan telah memberikan satu perintah mengenepikan injunksi Mahkamah Tinggi (lihat ms 564G–H, 565C–F).

(2) Perhubungan kepada Lembaga Tatatertib atau kepada Tribunal Siasatan tidaklah sama seperti perhubungan kepada satu mahkamah undang-undang. Seksyen 111 Akta Profesyen Undang-Undang 1976 tidak memberikan apa-apa kekebalan kepada defendan apabila beliau berhubung dengan Lembaga Tatatertib atau Tribunal Siasatan. Seksyen 111 hanya memberikan perlindungan kepada ahli-ahli Lembaga Tatatertib atau Tribunal Siasatan. Prosiding di hadapan Lembaga Tatatertib atau Tribunal Siasatan tidak boleh disamakan dengan prosiding di hadapan mahkamah undang-undang di mana litigan-litigan menikmati kekebalan kehakiman yang diberikan oleh s 14(1) Akta Mahkamah Kehakiman 1964 (lihat ms 566H–567A).

(3) Dalam satu tindakan untuk prosiding kerana penghinaan seorang defendan tidak boleh menggunakan satu pembelaan perlindungan mutlak dengan cara sebagaimana yang ada dalam satu tindakan untuk fitnah. Perhubungan litigan kepada Lembaga Tatatertib atau Tribunal Siasatan tidak dilindungi dengan kekebalan sepenuhnya di bawah s 111 Akta Profesyen Undang-Undang 1976. Begitu juga dengan perhubungan kepada satu mahkamah undang-undang yang mempunyai kenyataan berunsur fitnah hanya boleh dibuat dalam batasan tertentu. Jika batasan tersebut dilanggar maka pembelaan untuk perlindungan mutlak akan lenyap (lihat ms 567A–C); *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ diikut.

(4) Berdasarkan fakta-fakta tersebut, defendan telah melampaui batasan munasabah prinsip sebagaimana yang dinyatakan dalam *Manjeet Singh Dhillon*. Tindakan beliau menghantar dokumen-dokumen berunsur fitnah kepada Lembaga Tatatertib atau Tribunal Siasatan tersebut dengan jelas dilakukan dengan sengaja dan tegar. Defendan telah gagal untuk menimbulkan apa-apa keraguan dalam kes plaintif dan adalah bersalah kerana menghina mahkamah sebagaimana yang dikatakan oleh plaintif. Berdasarkan semua keadaan kes, Mahkamah Tinggi berpandangan bahawa tindakan-tindakan defendan menghantar dokumen-dokumen berunsur fitnah kepada Lembaga Tatatertib atau Tribunal Siasatan tersebut adalah tidak wajar dilakukan oleh seorang ahli kanan Majlis. Beliau telah menunjukkan bahawa beliau tidak menghiraukan langsung perintah Mahkamah Tinggi. Oleh itu satu amaran memang tidak mencukupi dan satu hukuman pencegahan patut dikenakan. Satu denda tidak akan berkesan kerana defendan amat mampu dari segi kewangan. Satu hukuman penjara adalah sesuai dan akan bertindak sebagai satu pencegahan. Defendan oleh itu telah dijatuhkan hukuman penjara tiga bulan. Beliau juga diarahkan menanggung kos prosiding (lihat ms 567G–H, 568B–C, G–569A).]

Notes

For cases on committal proceedings, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1466–1472.

For cases on sentence, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1529–1534.

For cases on injunction generally, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2463–3008.

For cases on professional privilege generally, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1832–1841.

Case referred to

Attorney General, Malaysia v Manjeet Singh Dhillon [1991] 1 MLJ 167 (refd)

Legislation referred to A

Courts of Judicature Act 1964 s 14(1)
Legal Profession Act 1976 ss 101(4)(a)(i), 111

Gurbachan Singh (*Malik Imtiaz* with him) (*Syarikat M Segaram*) for the plaintiff.

Mahadevi a/p Nadchatiram (*Mahadevi Nadchatiram & Partners*) for the defendant. B

Azmel J: This is an application by the plaintiff by way of an notice of motion under encl 201 seeking for an order that the defendant be committed to prison for committing several contempts of this honourable court. The acts of contempt of the defendant as alleged by the plaintiff are as follows: C

(a) on 27 November 2000, published or distributed to the Advocates and Solicitors Disciplinary Board and the Investigating Tribunal defamatory words against the plaintiff in breach of the order of injunction dated 22 January 2000; D

(b) and undermined the integrity of the judicial system and administration of law, Malaysia and brought the administration of law into disrespect in breaching the order of injunction and award of damages made by the High Court judge on 22 January 2000. The trite aim of the defendant in enclosing the documents in her letter dated in 27 November 2000 is to show directly or indirectly that the judgment given by the judge against her is wrong and should not be followed. E

The brief facts of the case that led to this action are as follows. It commenced when the plaintiff wrote a letter of complaint dated 27 January 1997 to the Advocates and Solicitors Disciplinary Board complaining against the conduct of the defendant, who is an advocate and solicitor, practising under the name and style of Messrs Mahadevi Nadchatiram & Partners. The gist of the complaint was: F G

> ... whilst acting as advocate and solicitor for the defendants in the Seremban High Court Civil Suit No 22–61–93 had made serious libellous and scandalous statements imputing criminal conduct on the part of the plaintiff in a written submission dated 11 October 1993.

Arising from the plaintiff's complaint, the Advocates and Solicitors Disciplinary Board issued a show cause letter dated 14 March 1998 to the defendant asking her to give an explanation. In compliance with that show cause letter, the defendant gave her explanation in a letter dated 8 April 1998 to the said Disciplinary Board, in the form of a reply to the complaint letter by the plaintiff. Following that, an Investigating Tribunal of the Advocates and Solicitors was established to investigate the said complaint. In the meantime, Kuala Lumpur Civil Suit No S2(S3)23–04–1997 which involved the plaintiff and the defendant was heard by James Foong J and H I

on 22 January 2000, the learned judge made an order against the defendant. Part of the said order states as follows:

> Mahadevi a/p Nadchatiram, defendan yang dinamakan di atas, sama ada mewakili beliau sendiri, pengkhidmat-pengkhidmatnya atau wakil-wakilnya atau sesiapa pun dihalang secara kekal dan suatu injunksi kekal adalah dengan ini diberikan untuk menghalang Mahadevi a/p Nadchatiram daripada menerbitkan dalam apa-apa bentuk atau menyebabkan untuk menerbitkan penyataan-penyataan bersifat libel dan fitnah terhadap plaintif.

In other words, this is a permanent injunction prohibiting the defendant from publishing any libellous and scandalous statements against the plaintiff.

On 9 October 2000, the said Investigating Tribunal issued a letter to the defendant asking for an explanation in respect of her said conduct. This was followed by another letter from the said Investigating Tribunal dated 24 October 2000 to the defendant. On 27 October 2000, the defendant responded to the Investigating Tribunal's letter of 24 October 2000. In this letter, the defendant sought the direction from the Investigating Tribunal whether she could forward to the Disciplinary Board several documents that had been produced at the Kuala Lumpur Civil Suit before James Foong J where the order of injunction against her had been issued on 22 January 2000. The relevant paragraph of the letter states:

> In the above circumstances and *in the light of the injunction against our client*, as can be seen from (e) and (f) above we are humbly seeking directions from the Advocates and Solicitors Disciplinary Board pertaining to the fact that our client wishes to adduce further documentation and *our client seeks the assurance of the Advocates and Solicitors Disciplinary Board and the complainant that no further defamatory actions or any action pertaining to the order of court dated 22 January 2000 will be commenced against our client.* (Emphasis added.)

In respect of the above request by the defendant, the Advocates and Solicitors Disciplinary Board replied in a letter dated 3 November 2000 rejecting the defendant's request. The relevant paragraph of the letter states:

> Please be informed that the Advocates and Solicitors Disciplinary Board ('the Board') is not in the position to and is unable to provide any form of assurance sought for in your said letter dated 27 October 2000.

The plaintiff, in his letter dated 31 October 2000 to the secretary of the investigating tribunal, had objected strongly to the giving of any form of assurances to the defendant by the Disciplinary Board. The plaintiff reiterated that the defendant should strictly comply with the injunctive order of the court.

Despite such rejections, the defendant, vide a letter dated 27 November 2000 sent a letter to the Disciplinary Board in which she included all the documents that were produced at the hearing of the Kuala Lumpur High

Court Civil Suit Nos 85–23–04–1997 and 85–23–08–1997 before James Foong J which included the notes of proceedings, defendant's written submission, memorandum of appeal and defendant's written submission to the Court of Appeal vide Civil Appeal No W–02–113–2000 and also the writ of summons and statement of claim, defences and reply to the defence in respect of the Seremban High Court Civil Suit No 22–52–1995.

It was contended by the plaintiff that the defendant had breached the injunctive order of the court dated 22 January 2000 by publishing the documents which she had included in her letter dated 27 November 2000. As such on 19 December 2000, the plaintiff applied, by way of an ex parte notice of motion, for leave of court to make an application for an order of committal to commit the defendant in prison arising from committing a breach of the said injunctive order. Leave of court was granted on 21 February 2001. Under encl 201, the plaintiff filed by way of notice of motion applying for an order that the defendant be committed to prison for committing breach of the said injunctive order.

The hearing of this notice of motion was fixed before me on 22 January 2003. Prior to this date, at the stage of case management, both parties had agreed that the hearing of this application be conducted by relying on affidavit evidence since the issues of facts were not in dispute. What was left to be argued were issues of law. As such for purposes of the hearing of this application, both parties had agreed to rely on their affidavits and to give written submissions.

It may also be pertinent to note at this juncture that related to this application there were two other applications filed, one by the plaintiff and the one by the defendant. Under encl 208 was an application by the defendant for a motion to set aside the plaintiff's application under encl 201. And under encl 234 was the plaintiff's application to cross-examine the defendant on the issue of service. However, at the commencement of the hearing before me on 22 January 2003 the defendant decided to withdraw her application under encl 208 and the plaintiff in turn decided to withdraw his application under encl 234. With the withdrawals of encll 208 and 234, only the application under encl 201 remained to be heard.

For purposes of this action, it is quite pertinent to give serious consideration to the following relevant facts:

1 the plaintiff's complaint against the defendant to the Disciplinary Board in a letter dated 27 January 1997 in respect of the defendant's conduct at the proceedings of Seremban High Court Civil Suit No 22–61–1993 at which proceedings the defendant had published scandalous and libellous statements, which included imputing criminal conduct on the part of the plaintiff;

2 on 22 January 2000, James Foong J had issued a permanent injunction against the defendant vide Kuala Lumpur Civil Suit No 52(55)–23–04–1977 tried together with Civil Suit No 55–23–08–

1977 in which the plaintiff sued the defendant for nine counts of libel and slander and the learned judge found the defendant liable for all counts except the first, second and ninth counts. In the order of injunction the defendant was prohibited from publishing in any form of libellous and scandalous statements against the plaintiff;

3 the Advocates and Solicitors Investigating Tribunal had on 9 October 2000 and 24 October 2000 issued letters to the defendant asking for an explanation of her conduct as complained of by the plaintiff in his complaint letter of 27 January 1977;

4 on 27 October 2000, the defendant wrote to the Disciplinary Board seeking directions and assurance from the Disciplinary Board that no action be taken against her through adducing further evidence in the light of the court order dated 22 January 2000;

5 by a letter dated 3 November 2000, the Disciplinary Board informed the defendant that they were unable to provide any form of assurance sought by the defendant;

6 by a letter dated 31 October 2000, the plaintiff also objected to the above request of the defendant;

7 on 27 November 2000, the defendant sent a letter to the Investigating Tribunal which included the following:

(a) notes of proceedings in Kuala Lumpur Civil Suit No 55–23–04–1997 and 55–23–08–1997;

(b) the memorandum of appeal of the Court of Appeal Civil Appeal No W–02–113–2000;

(c) the defendant's written submission filed in Kuala Lumpur High Court Civil Suit No 55–23–08–1997 and 55(52)–23–04–1997;

(d) the defendant's written submission filed in the Court of Appeal Civil Appeal No W–02–113–2000;

(e) the writ of summons and statement of claim, defences and reply to the defence vide Seremban High Court Civil Suit No 22–52–1998.

From the above relevant facts, it was clear and not disputed by the defendant that among the documents sent by the defendant to the Investigating Tribunal vide her letter dated 27 November 2000 were the libellous and scandalous materials that James Foong J ruled in the case Kuala Lumpur High Court Civil Suit Nos 82(85)–23–04–1997 and 85–23–08–1997 at which hearing the learned Judge issued an injunctive order dated 22 January 2000 prohibiting the defendant from publishing any libellous and scandalous statement against the plaintiff. It goes without saying that from the notes of proceedings all the libellous and scandalous statements which led to the learned judge finding the defendant liable for all counts except the first, second and ninth counts were contained.

The only issue that needed to be determined in this case is whether in law the defendant had contravened the injunctive order of 22 January 2000 issued by the learned judge. This action being a quasi criminal in nature the burden is on the plaintiff to prove beyond reasonable doubt that the defendant had breached the said injunctive order.

The counsel for the plaintiff in his written submissions had contended that, to begin with, the plaintiff had complied with all the necessary requirements for committal proceedings, which includes filing of statement pursuant to O 52 r (2) of the Rules of the High Court 1980. I was quite satisfied that the plaintiff had fully complied with the necessary procedural requirements for this committal proceedings. At the commencement of the hearing before me, the defendant admitted that the injunctive order of 22 January 2000 was enforceable and such order had been properly served on her. This can be further corroborated by her decision to withdraw her application under encl 208.

The only matter left to be determined, as agreed by both parties, was the merit of the paintiff's application.

It was contended by the plaintiff's counsel that what was required of the defendant by the Investigating Tribunal was to explain her conduct at the Seremban High Court Civil Suit No 22–61–1993 proceedings. But the defendant, quite unnecessarily, decided to produce all the notes of proceedings in the Kuala Lumpur High Court proceedings which were conducted before James Foong J in which she was sued for nine counts for publishing libellous and scandalous statements with the result she was found liable for all counts except the first, second and ninth counts. With the findings of the learned judge, there could not be any doubt that the notes of proceedings and the defendant's submission contained the libellous and scandalous statements against the plaintiff which the court ordered not to publish. The issuance of the permanent injunction by the learned judge prohibiting the defendant from publishing any libellous and scandalous statements against the plaintiff would certainly have been breached when the defendant sent the notes of proceedings of the case together with the defendant's written submission to the Disciplinary Board/ Investigating Tribunal.

From the facts adduced before me, the defendant was fully aware that the publication of such documents to any third party would constitute a breach of the injunctive order. It was for that reason that she sought directions and assurance from the Disciplinary Board not to bring action against her for adducing additional documents which contained the prohibited statements. The second paragraph of her letter to the Disciplinary Board dated 27 October 2000 states:

> We wish to inform you that the complainant above named had vide Kuala Lumpur High Court Civil Suit No 55–23–08–1999 consolidated with 52(55)–23–04–1997 filed twofamation actions against our client. These actions were fully tried before the Honourable Justice Dato' James Foong Cheng Yuen and on 2 January 2000, his Lordship gave judgment in favour of

A the complainant granting damages of RM3,500,000 and furthermore a permanent injunction restraining our client from repeating any defamatory statements. Our client subsequently filed an appeal to the Court of Appeal against the whole of the said decision. The appeal (Civil Appeal No W–02–113–2000) has been heard and decision reserved.

B In another paragraph of the same letter, the defendant made a request:

In the above circumstances and in the light of the injunction against our client, as can be seen from (e) and (f) above we are humbly seeking directions from the Advocates & Solicitors Disciplinary Board pertaining to the fact our client wishes to adduce further documentation and our client seeks the C assurance of the Advocates & Solicitors Disciplinary Board and the complainant that no further defamatory actions or any action pertaining to the order of court dated 22 January 2000 will be commenced against our client.

Such request for assurances had been rejected by the Disciplinary Board. In addition, the plaintiff had also objected to her request. Yet vide her letter D dated 27 November 2000, the defendant sent the notes of proceedings of the Kuala Lumpur High Court Civil Suit together with her written submissions which contained all the defamatory statements against the plaintiff that led her to be found liable for defamation on six counts by the learned judge. With such evidence, I have no doubt whatsoever that the E defendant had breached the order of permanent injunction of the court. That injunctive order of the court was still in force and effective. The fact that the defendant had filed an appeal to the Court of Appeal and that the appeal was heard but decision was reserved did not mean that the injunctive order was no longer in force. The injunctive order would only cease to be effective and in force if the Court of Appeal had given a decision F setting aside the said injunction. In this case, I was unable to find any evidence that the Court of Appeal had given an order setting aside the order of injunction of the learned High Court judge. In such circumstances, the order of injunction still remains in force and is effective with which the defendant must comply. Having considered the whole facts and the circumstances of the case, I was quite satisfied that the plaintiff had G presented its case beyond reasonable doubt. Such being the position, in order for the defendant to escape liability it was incumbent upon her to create doubts in the plaintiff's case.

In her written submission, the defendant raised two main grounds. Firstly, the defendant contended that the disclosure of the court documents H to the Advocates & Solicitors Disciplinary Board did not amount to a breach of the terms of the order of injunction of the learned judge. Her reasons for saying so were:

(1) the disclosure to the said Disciplinary Board was a privileged I communication; and

(2) the disclosure was mandatory under s 101(4)(a)(i) of the Legal Profession Act 1976.

This defence of privileged communication raised by the defendant gave rise to two issues, namely:

(1) whether the defendant's communication to the Disciplinary Board/ Investigating Tribunal affords absolute privilege within the meaning of the Legal Profession Act 1976; and

(2) whether in an action for committal the defence of absolute privilege can be pleaded.

It was strongly argued by the counsel for the plaintiff that the Disciplinary Board and Investigating Tribunal cannot be equated to that of a court of law and therefore they do not enjoy absolute privilege as enjoyed by the High Court or judges. Section 14(1) of the Courts of Judicature Act 1964 gives judicial immunity for judges and other persons acting judicially, as long as it is done in good faith. In contrast, s 111 of the Legal Profession Act 1976 does not confer any judicial immunity for any acts done in the discharge of his judicial duty but only confers protection for acts or things done under the Legal Profession Act 1976. And it only confers protection to the members of the Investigating Tribunal, the Disciplinary Committee, the Disciplinary Board, the Malaysian Bar or the Bar Council. From its wordings, it does not confer any protection for those parties appearing before the Disciplinary Board or Investigating Tribunal. As such, the plaintiff's counsel submitted that it was totally misconceived for the defendant to argue that she enjoyed absolute privilege at the proceedings before the Disciplinary Board/Investigating Tribunal.

The counsel for the plaintiff further contended that in an action for committal proceedings the defence of absolute privilege cannot be pleaded. Such defence may be pleaded in an action for defamation. The counsel referred to the case of *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167. The learned counsel for the plaintiff quoted the decision of Mohamed Yusoff SCJ as follows (at p 180):

> Raja Aziz contended that the respondent's criticism were relevant to his pleading in order to support his motion before the court. My view to that is, the rule of relevancy of evidence is not a licence to the respondent to be contamelious or to grant any litigant like him to advance contemptuous statement against the court or administration of justice. It is a fallacy to suppose that the respondent had that liberty or privilege (see *R v Collins* [1954] VLR 46).

Having considered this first ground raised by the defendant, I fully agree with the submission by the counsel for the plaintiff. Communications to the Disciplinary Board or to the Investigating Tribunal cannot be equated with communication to a court of law. Section 111 of the Legal Profession Act 1976 does not confer any judicial immunity to the defendant when she communicated with the Disciplinary Board/Investigating Tribunal. That section only confers protection to the members of the Disciplinary Board and the Investigating Tribunal. In other words, proceedings before the Disciplinary Board/Investigating Tribunal cannot be equated to

proceedings before a court of law where litigants also enjoy judicial immunity conferred by s 14(1) of the Courts of Judicature Act 1964.†

I was also in full agreement with the plaintiff's counsel's contention that in an action for committal proceedings the defendant could not invoke a defence of absolute privilege in the manner that would be available in an action for defamation. Firstly, as explained above, unlike a court of law, any litigant's communication to the Disciplinary Board/Investigating Tribunal would not be covered by absolute immunity within the meaning of s 111 of the Legal Profession Act 1976.

Secondly, even communications to a court of law that contains defamatory statements should only be done within certain limits. If the limits are exceeded then the defence of absolute privilege would no longer be available.

In the case of *Manjeet Singh Dhillon*, Gunn Chit Tuan SCJ (as he then was) stated (at p 181):

> I would also refer to the Australian case of *R v Collins*, in which the Supreme Court of Victoria held that it is not a defence to a charge of contempt of court that the affidavit relied on as contemptuous is relevant to the proceedings in which it was made, *if such affidavit goes beyond what any litigant could honestly and reasonably think to be no more than necessary or proper to establish a defence to the proceedings or could honestly and reasonably consider to form the basis of a serious and genuine argument in the proceedings.* (Emphasis added.)

It must be pointed out that in the instant action the defendant was only asked to explain her conduct at the Seremban High Court Civil Suit by the Investigating Tribunal. First and foremost, nothing would have happened to the defendant if she decided not to give any explanation to the Investigating Tribunal except that the Investigating Tribunal would have to fix a date for the hearing of the disciplinary action against her. Secondly, whatever explanation that she was obliged to give should be confined to what had transpired at the Seremban High Court Civil Suit. Therefore, it was completely irrelevant for the defendant to send the notes of proceedings together with her written submission of the Kuala Lumpur High Court Civil Suits as well as her memorandum of appeal to the Court of Appeal together with her written submission, knowing fully well that there was in force an injunctive order prohibiting her from publishing defamatory statements against the plaintiff. Hence, she had clearly gone beyond the reasonable limit principle as stated in *Manjeet Singh Dhillon*.

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† [*Editorial Note*: Section 14(1) of the Courts of Judicature Act 1964 does not confer judicial immunity upon a private litigant. Section 14(1) of the Courts of Judicature Act 1964 only protects judges or other persons acting judicially. A private litigant only enjoys immunity conferred by common law. See *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [2000] 5 MLJ 465 at pp 486–488 for the nature and extent of such immunity.]

On the evidence before me, the defendant could not lead that she was not aware of such contravention when she herself had written the letter of 27 October 2000 to the Disciplinary Board seeking for some form of assurance that no action would be taken against her for breaching the injunction order. After having been in practice for more than 20 years, the defendant is expected to know what acts are lawful and what acts are unlawful. On the facts of this case, it was quite obvious to me that her act of sending the defamatory documents to the Disciplinary Board/ Investigating Tribunal was clearly wilful and contumacious.

After having considered the defendant's defence as a whole I arrived at the conclusion that the defendant had failed to create any doubt in the plaintiff's case. I therefore found her guilty of the contempt of court as alleged by the plaintiff.

Before passing the sentence I requested the defendant to make a plea for mitigation of sentence. She stated that she had no intention to commit the contempt. She also apologised and promised not to commit the offence again. However, she continued to say repeatedly that she was not liable for defamation against the plaintiff. In conclusion she claimed that the incident had occurred mainly because of the contumacious conduct of the plaintiff.

I have considered her plea in mitigation and I have also taken into account that the plaintiff's counsel had left the question of sentence entirely to the court. In my view this is a very serious offence committed by a very senior member of the Malaysian Bar. As a member of the Bar and an officer of the court, it is incumbent upon her to abide and respect decision of the court. The order of injunction issued by the learned judge was very clear. The defendant was directly involved in the civil suit. The learned judge had made a finding that the defendant was liable for making defamatory statements against the plaintiff. Parties to the proceedings including the defendant must accept the finding of the learned judge, more so when the defendant is an Advocate & Solicitor. The finding of the learned judge should continue to remain in force until reversed by a court of higher jurisdiction. At the time the defamatory documents were sent to the Disciplinary Board/Investigating Tribunal, the Court of Appeal had not given any decision in respect of the learned judge's decision nor did the Court of Appeal disturb the order of injunction of the High Court judge. Having regard to the whole circumstances of this case I was of the view that the acts of the defendant in sending the defamatory documents to the Disciplinary Board/Investigating Tribunal were most unbecoming of a senior member of the Bar. She had shown to have complete disregard to an order of the High Court. As such, merely giving her a caution or a warning for her misdeed would be manifestly inadequate. A more deterrent sentence should be imposed. A fine would serve no purpose because she appeared to be financially loaded. At a session in my chambers before the commencement of this hearing, she tried to make an offer of settlement to the plaintiff by promising to give a sum of more than a million ringgit. In view of the above, I came to the conclusion that a custodial sentence would be the most appropriate and would act as a deterrence. I therefore

sentenced her to three months' imprisonment, which I think would be fair and just. I also ordered that the defendant bear the costs of these proceedings.

Defendant convicted for contempt of court and sentenced to three months' imprisonment.

Reported by Andrew Christopher Simon